RECEIVED
CENTRAL FAX CENTER

MAY 12 2006

CLARK
&
BRODY

SUITE 250
1090 VERMONT AVENUE, NW
WASHINGTON, DC 20005
TELEPHONE: 202-835-1111
FACSIMILE: 202-835-1755

FACSIMILE TRANSMISSION

TO:	COMPANY:
Examiner: AGARWAL, Manuj Art Unit 3764	U.S. Patent and Trademark Office
FAX NUMBER:	PHONE NUMBER:
571-273-8300	

From: Christopher W. Brody **Date:** May 12, 2006

Total Number of Pages Including Cover Sheet: 4

Message: Please see attached REQUEST FOR RECONSIDERATION.

CERTIFICATION OF FACSIMILE TRANSMISSION

I hereby certify that the attached **REQUEST FOR RECONSIDERATION** for **U.S. Serial No. 10/781,807** is being facsimile-transmitted to the U.S. Patent and Trademark Office on the date shown below.

Christopher W. Brody, Registration No. 33,613
Type or print name of person signing certification

Signature Date: May 12, 2006

If you have not received the total number of pages, please call Tracy Boyden at (202) 835-1111. ***Thank you.***

RECEIVED
CENTRAL FAX CENTER

MAY 12 2006

Docket No. 12079-0002

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Application of:

Peter SILS — Art Unit: 3764

Application No.: 10/781,807 — Examiner: Agarwal, Manuj

Filed: February 20, 2004 — Attorney Dkt. No.: 12079-0002

For: EXERCISE GEL BALL AND METHOD OF USE

REQUEST FOR RECONSIDERATION

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

May 12, 2006

Sir:

Applicant respectfully traverses the rejection of all claims as set forth in the outstanding Office Action of March 22, 2006.

Critical to the entire rejection is the assumption that the disclosure in the specification that the balls are made by Applicant's manufacturer (Huizhgu Hui Lon Plastic Pty, hereinafter Huizhgu) is prior art against the invention. In fact, the Examiner assumes that such is the case by alleging that the disclosure "implies" that the balls are not part of the inventive concept. Put another way, the Examiner is considering the balls of the invention to have sat on the shelf of Huizhgu (without any factual basis to make such an allegation), and the inventor just came along and decided to use it in the disclosed method.

All rejections using the disclosure in the specification must be withdrawn since the disclosure in question is not prior art against the application. First, the Examiner has the

initial burden of establishing a *prima facie* case of anticipation or obviousness and this must be done on a factual basis. What the Examiner has done is assume that the balls in fact existed in the prior art prior to Applicant's invention. There is no factual support for this assumption. The mere fact that the specification teaches how to obtain the inventive ball is not the same as saying that the balls were made prior to the invention. There is no statement in the specification as to when the balls were available, and the Examiner has speculated on the issue of availability. The reference to the manufacturer Huizhgu of the ball merely explains to one of skill in the art where the ball can be obtained. This disclosure is not an admission that the claimed ball existed prior to Applicant's invention, and it cannot be used against the Applicant in any rejection based on 35 U.S.C. § 102(b) or 35 U.S.C. § 103(a).

Since Huizhgu is relied upon to reject claims 11-15 and claims 1-10, and Huizhgu is not prior art against the claims, these rejections are flawed and must be withdrawn. The secondary references relied upon by the Examiner do not by themselves anticipate or render obvious claims 1-15 of this application. Thus, the Examiner cannot remake the rejection based on this prior art.

If the Examiner persists in making another rejection, the Examiner is called upon to explain in detail the factual basis to support such a rejection.

In summary, the arguments set forth above show that the Examiner has failed in meeting the PTO-required burden of establishing a *prima facie* case of anticipation or obviousness against the claims. Accordingly, the rejections are in error and must be withdrawn.

Therefore, the Examiner is respectfully requested to examine this application and

pass claims 1-15 onto issuance.

If the Examiner believes that an interview with Applicant's attorney would be helpful in expediting allowance of the application, the Examiner is requested to telephone the undersigned at the number given below.

The above constitutes a complete response to all issues raised in the Office Action dated March 22, 2006.

Again, reconsideration and allowance of this application is respectfully requested.

Please charge any fee deficiency or credit any overpayment to Deposit Account No. 50-1088.

Respectfully submitted,
CLARK & BRODY

Christopher W. Brody
Registration No. 33,613

Customer No. 22902
1090 Vermont Ave. NW
Suite 250
Washington, DC 20005
Telephone: 202-835-1111
Facsimile: 202-835-1755

Date: May 12, 2006
Docket No. 12079-0002